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Lingam a/l Ramaiyah & Anor v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO A-05–143 OF 2011
ABDUL MALIK ISHAK, AZAHAR MOHAMED AND ZAWAWI SALLEH JJCA
9 DECEMBER 2013

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Criminal Procedure — Appeal — Appeal against conviction and sentence — Accused persons convicted for murder — Accused persons sentenced to death — Prosecution case rested on eyewitnesses — Whether prosecution case proved beyond reasonable doubt — Appeal against decision of High Court — Whether judicial commissioner erred in failing to appreciate that there were numerous material discrepancies between evidence of witnesses — Whether discrepancies given rise to doubts as to whether eyewitnesses were present at crime scene — Whether unexplained material discrepancies raised reasonable doubt on prosecution case

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This was an appeal by the first and second appellant against their convictions and death sentences by the High Court on the charge of murder of one Mungunthan ('the deceased'). The prosecution rested their case on eyewitnesses, SP4 and SP5 who were at the crime scene. It was based on their evidence that the High Court was satisfied that the prosecution had proved the case against both the appellants beyond reasonable doubt. The facts as unfolded revealed that SP4 had came to visit the deceased. When SP4 came home, the deceased was not in but he met his other elder brother ('Thanabalan') who stayed with the deceased. Later, the deceased came home at 10pm and the three brothers were chatted for about half an hour. Not long after that, Thanabalan left the house and the deceased retired to bed. At about 11.30pm, SP5 came to look for SP4. SP4 then asked SP5 to buy for him some food from the shop. On his way out to buy food, SP5 was stopped by the second appellant who asked the former whether the deceased was in the house. SP5 said he did not know. At that time, the first appellant who was with the second appellant had mistaken SP5 as the deceased and wanted to beat him up. SP5 then took the second appellant to the deceased's house on his motorcycle as a pillion rider. SP4 and the second appellant then engaged in a conversation in the Tamil language. When SP4 was talking to the second appellant, a car came at high speed and stopped in front of SP5. When the driver came out of his car, SP4 ran away. When SP4 ran away, the driver went back to his car and chased after SP4 in his car. Then came the first appellant and two other persons. SP5 saw the driver alighting from his car and carrying a piece of wood waiting in front of the car. About 10 minutes later, the first and second appellants and two others were seen pulling the deceased out of the house and being beaten up by the four persons. The two appellants were seen using a helmet in the assault.

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After beating the deceased, they pulled him to the car. SP5 saw one of the two persons took an exhaust pipe and beat the deceased and some of them were using flower pots to beat the deceased. The deceased was trying to run away but he fell into a drain. The driver then went towards the deceased and beat him with the piece of wood he was holding. After the assault, the deceased was pulled into the car. On the next day, the deceased's body was found near a riverside. A post-mortem revealed that the cause of the deceased's death was due to head injuries caused by blunt trauma. In the present appeal, the main thrust of the arguments for the appellants was that the judicial commissioner ('JC') had erred in failing to appreciate that there were numerous material discrepancies between the evidence of SP4 and SP5 and such discrepancies had given rise to doubts as to whether SP4 and SP5 were present on the night in question and whether they could be believed that they had seen the deceased being assaulted. It was further argued that the JC misdirected himself in that he overlooked and failed to appreciate that the unexplained material discrepancies had raised a reasonable doubt on the prosecution's case.

Held, dismissing the appeal:

(1) This was a factually based ground of appeal, essentially revolved around the issue as to whether SP4 and SP5 were credible witnesses. The same arguments were raised before the JC. The JC had given his most anxious considerations of the so-called discrepancies between the evidence of SP4 and SP5. Nothing more might fairly be expected of the JC on this issue. Even if there were discrepancies in the evidence of SP4 and SP5, it did not mean that the whole evidence of the prosecution had to be discarded. Minor discrepancies were common features in the testimony of any two witnesses. The JC had made every effort to discover the core of the truth in the evidence of both SP4 and SP5. The JC had directed himself correctly upon this aspect of the law and it would be wrong to say that just because a witness might have contradicted himself in his evidence or even told lies on one or two points his whole evidence should be totally rejected (see paras 10–11).

(2) Since this issue involved the credibility of SP4 and SP5, as a trier of fact, the JC was, as a matter of fact, in a better person to judge whether or not they were witnesses of truth and even if their evidence in regard to one part of prosecution case was not accepted, their reliable and trustworthy evidence in other parts of the prosecution case could be acted upon. The JC for good and cogent reasons found that both SP4 and SP5 to be truthful and reliable witnesses. From the evidence, it had been established that both SP4 and SP5 were present at the crime scene on the night in question. Even more to the point, evidence showed that two of the five assailants who came to the deceased's house on the night in question were the first and second appellants and that they and three others who were still at large had assaulted the deceased with helmet, a piece of wood,

flower pots and exhaust pipe on the night in question before taking the deceased away in their car. The existence of common intention was a question of fact and in each case it might be proven as a matter of inference from the circumstances of the case (see para 11).

(3) Careful perusal of the entire primary facts adduced by the prosecution warranted an inference of the common intention of all, including both the appellants to commit murder by causing the death of the deceased. The JC's findings of fact did not contain any error warranting appellate intervention. In this regard, it was an established principle that an appellate court should be slow in disturbing such finding of fact arrived at by the trial judge, who had the advantage of seeing and hearing the witnesses, unless there were substantial and compelling reasons for disagreeing with the finding (see para 11).

(4) Adverse inference under the provision could only be drawn if there was withholding or suppression of evidence and not merely on account of failure to obtain such evidence. Moreover, adverse inference might be drawn from withholding not just any document, but material document by a party in his possession. On the facts, the log book was neither relevant nor material for the purpose of establishing a prima facie case against both the appellants. The prosecution had led sufficient evidence to unfold the narrative of the case, and that the failure to produce the log book was not fatal (see para 12).

(5) The JC correctly held the evidence adduced by the defence was evidence in support of the defence of alibi. This then brought into direct focus the provision of s 402A of the Criminal Procedure Code, which provided that where in any criminal trial the accused seeks to put forward a defence of alibi, evidence in support thereof shall not be admitted unless the accused shall have given notice in writing thereof to the public prosecutor at least ten days before the commencement of the trial (see para 13).

[Bahasa Malaysia summary

Ini adalah rayuan oleh perayu pertama dan kedua terhadap sabitan-sabitan dan hukuman mati mereka oleh Mahkamah Tinggi atas pertuduhan membunuh Mungunthan ('si mati'). Pendakwaan bersandarkan kes mereka pada saksi-saksi utama, SP4 dan SP5 yang berada di tempat kejadian. Ia berdasarkan keterangan mereka bahawa Mahkamah Tinggi berpuas hati yang pihak pendakwaan telah membuktikan kes terhadap kedua-dua perayu melampaui keraguan munasabah. Fakta-fakta yang terungkai menunjukkan bahawa SP4 datang melawat si mati. Apabila SP4 pulang ke rumah, si mati tidak berada di situ tetapi dia berjumpa abangnya ('Thanabalan') yang tinggal dengan si mati. Kemudian, si mati pulang ke rumah pada pukul 10 malam dan ketiga-tiga adik-beradik lelaki berborak lebih kurang setengah jam. Tidak lama kemudian, Thanabalan meninggalkan rumah itu dan si mati masuk tidur. Lebih kurang

pukul 11.30 malam, SP5 datang untuk berjumpa SP4. SP4 kemudian meminta SP5 membeli makanan untuknya daripada kedai. Semasa keluar membeli makanan, SP5 ditahan oleh perayu kedua yang bertanya kepadanya sama ada si mati berada di rumah. SP5 mengatakan dia tidak tahu. Pada masa itu, perayu pertama yang bersama perayu kedua telah salah anggap yang SP5 adalah si mati dan hendak memukulnya. SP5 kemudian membawa perayu kedua ke rumah si mati dengan motorsikalnya sebagai pembonceng. SP4 dan perayu kedua kemudian mula berbual dalam bahasa Tamil. Semasa SP4 bercakap dengan perayu kedua, sebuah kereta dengan kelajuan tinggi muncul dan berhenti di hadapan SP5. Apabila pemandu keluar daripada keretanya, SP4 telah melarikan diri. Apabila SP4 melarikan diri, pemandu itu masuk balik ke dalam keretanya dan mengejar SP4 dengan keretanya. Kemudian perayu pertama dan dua orang lain muncul. SP5 melihat pemandu keluar dari keretanya dan membawa sebatang kayu sedang menunggu di depan kereta itu. Lebih kurang 10 minit kemudian, perayu-perayu pertama dan kedua dan dua orang lain dilihat menarik si mati keluar dari rumah itu dan dipukul oleh empat orang tersebut. Kedua-dua orang perayu dilihat menggunakan topi keledar semasa serangan itu. Selepas memukul si mati, mereka telah menariknya ke kereta. SP5 melihat salah seorang daripada dua orang itu mengambil paip ekzos dan memukul si mati dan beberapa orang menggunakan pasu-pasu bunga untuk memukul si mati. Si mati cuba melarikan diri tetapi jatuh ke dalam longkang. Pemandu itu kemudian menuju ke arah si mati dan memukulnya dengan kayu yang dipegangnya. Selepas serangan itu, si mati ditarik ke dalam kereta. Pada keesokan hari, mayat si mati dijumpai berdekatan tepi sungai. Post-mortem menunjukkan bahawa sebab kematian si mati adalah diakibatkan kecederaan kepala yang disebabkan oleh senjata tumpul. Dalam rayuan ini, hujah utama untuk perayu-perayu adalah bahawa pesuruhjaya kehakiman ('PK') terkhilaf kerana gagal menyedari bahawa terdapat pelbagai percanggahan material antara keterangan SP4 dan SP5 dan percanggahan tersebut telah menimbulkan keraguan berhubung sama ada SP4 dan SP5 hadir pada malam yang dipersoalkan dan sama ada mereka boleh dipercayai yang mana mereka telah melihat si mati dipukul. Selanjutnya adalah dihujahkan bahawa PK telah salah arah apabila beliau terlepas pandang dan gagal mengambil kira bahawa percanggahan material yang tidak dijelaskan telah menimbulkan keraguan munasabah ke atas kes pendakwaan.

Diputuskan, menolak rayuan:

(1) Ini adalah rayuan berasaskan fakta, terutamanya berkisarkan isu berhubung sama ada SP4 dan SP5 adalah saksi-saksi yang boleh dipercayai. Hujah-hujah sama ditimbulkan di hadapan PK. PK telah memberikan pertimbangan beliau berhubung percanggahan yang dikatakan antara keterangan SP4 dan SP5. Tiada apa lagi yang dijangkakan daripada PK berhubung isu ini. Jikapun terdapat percanggahan dalam keterangan SP4 dan SP5, ia tidak bermaksud

bahawa keseluruhan keterangan pendakwaan patut dibuang. Percanggahan kecil merupakan ciri-ciri biasa dalam testimoni mana-mana dua saksi. PK telah membuat segala usaha untuk Mengatakan kebenaran sebenar dalam keterangan kedua-dua SP4 dan SP5. PK telah mengarah dirinya dengan wajar berhubung aspek undang-undang dan adalah salah untuk mnegatakan bahawa hanya kerana seorang saksi mungkin bercanggah dengan dirinya dalam keterangannya atau malah menipu satu atau dua perkara maka keseluruhan keterangannya patut ditolak (lihat perenggan 11).

(2) Oleh kerana isu ini melibatkan kebolehpercayaan SP4 dan SP5, sebagai pembicara fakta, PK adalah, sebenarnya seorang yang lebih layak untuk mengadili sama ada atau tidak mereka merupakan saksi-saksi yang jujur dan meskipun keterangan mereka berkenaan salah satu bahagian kes pendakwaan tidak diterima, keterangan mereka yang boleh digunakan dan boleh dipercayai dalam bahagian lain kes pendakwaan boleh diterima pakai. PK mendapati, atas sebab-sebab yang kukuh dan meyakinkan, bahawa kedua-dua SP4 dan SP5 adalah saksi-saksi yang jujur dan boleh dipercayai. Berdasarkan keterangan, adalah dibuktikan bahawa kedua-dua SP4 dan SP5 berada ditempat kejadian pada malam yang dipersoalkan. Bahkan, keterangan menunjukkan bahawa dua daripada lima penyerang yang datang ke rumah si mati pada malam yang dipersoalkan itu adalah perayu-perayu pertama dan kedua dan bahawa mereka dan tiga orang lain yang masih bebas telah menyerang si mati dengan topi keledar, sebatang kayu, pasu-pasu bunga dan paip ekzos pada malam tersebut sebelum membawa pergi si mati dalam kereta mereka. Kewujudan niat bersama adalah persoalan fakta dan dalam setiap kes ia mungkin dibuktikan sebagai suatu perkara inferens berdasarkan keadaan kes (lihat perenggan 11).

(3) Penelitian terperinci berhubung keseluruhan fakta primer yang dikemukakan oleh pendakwaan mewajarkan inferens tentang niat bersama kesemua, termasuk kedua-dua perayu untuk melakukan pembunuhan dengan menyebabkan kematian si mati. Penemuan fakta PK tidak mengandungi apa-apa kesilapan yang mewajarkan campur tangan mahkamah rayuan. Sehubungan itu, adalah prinsip tetap bahawa mahkamah rayuan patut tidak mengganggu penemuan fakta hakim perbicaraan, yang mempunyai kelebihan melihat dan mendengar saksi-saksi, kecuali terdapat sebab-sebab yang penting dan memaksa untuk tidak bersetuju dengan penemuan tersebut (lihat perenggan 11).

(4) Inferens bertentangan di bawah peruntukan hanya boleh dibuat jika terdapat keterangan yang ditahan atau disekat dan bukan sahaja berdasarkan kegagalan untuk memperoleh keterangan sedemikian. Tambahan pula, inferens bertentangan boleh dibuat daripada menahan bukan sahaja apa-apa dokumen, tetapi dokumen penting oleh satu pihak

dalam milikannya. Berdasarkan fakta itu, buku log bukan sahaja tidak relevan atau penting bagi tujuan membuktikan kes prima facie terhadap kedua-dua perayu. Pihak pendakwaan telah mengemukakan keterangan mencukupi untuk menunjukkan naratif kes, dan bahawa kegagalan untuk mengemukakan buku log tidak memudaratkan (lihat perenggan 12).

(5) PK telah memutuskan sewajarnya keterangan yang dikemukakan oleh pembelaan adalah keterangan yang menyokong pembelaan alibi. Ini membawa kepada fokus secara langsung kepada peruntukan s 402A Kanun Tatacara Jenayah, yang memperuntukkan bahawa dalam apa-apa perbicaraan jenayah tertuduh memohon untuk mengemukakan pembelaan alibi, keterangan yang menyokong tidak patut diterima kecuali tertuduh perlu memberikan notis bertulis kepada pendakwa raya sekurang-kurangnya sepuluh hari sebelum perbicaraan bermula (lihat perenggan 13).]

Notes

For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 288–371.

Cases referred to

Che Omar bin Mohd Akhir v PP [1999] 2 MLJ 689; [1999] 2 CLJ 780, CA (refd)
Dato' Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232; [1983] 2 CLJ 10, FC (refd)
Herchun Singh & Ors v PP [1969] 2 MLJ 209, FC (refd)
Khoon Chye Hin v PP [1961] 1 MLJ 105b, CA (refd)
Krishna Rao a/l Gurumurthi v PP and another appeal [2009] 3 MLJ 643; [2009] 2 CLJ 603, FC (refd)
King-Mahbub Shah v Emperor AIR 1945 PC 118, PC (refd)
Muniandy & Ors v PP [1966] 1 MLJ 257, FC (refd)
Munusamy v PP [1987] 1 MLJ 492, SC (refd)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393, FC (refd)
Sabarudin bin Non & Ors v PP [2005] 4 MLJ 37; [2005] 1 AMR 4, CA (refd)
Vasan Singh v PP [1988] 3 MLJ 412; [1981] CLJ (Rep) 166, SC (refd)
Wan Yurilhami bin Wan Yaacob & anor v PP [2010] 1 MLJ 749; [2010] 1 CLJ 17, FC (refd)

Legislation referred to

Criminal Procedure Code s 402, 402A
Evidence Act 1950 s 114(g)
Penal Code ss 34, 302

Appeal from: Criminal Trial No 45B-8 of 2009 (High Court, Ipoh)

Harcharanjit Singh (Harcharanjit Singh & Associates) for the first & second appellant.
Tengku Amir Zaki bin Tengku Abdul Rahman (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Azahar Mohamed JCA (delivering judgment of the court):

[1] This was an appeal by Lingam a/l Ramaiyah ('first appellant') and Alagesan a/l Ramaiyah ('second appellant') against their convictions and death sentences by the High Court Ipoh on the charge of murder of one Mungunthan a/l Kuppusamy ('deceased').

[2] The first appellant and the second appellant are brothers. They were jointly charged and tried that they and three others who are still at large between 11.45pm on 29 October 2008 and 9.24am on 30 October 2008, near riverside at R & R, Jambatan Batu 5, Jalan Maharajalela, Teluk Intan, Perak, in furtherance of their common intention did commit murder by causing the death of the deceased, and that they had thereby committed an offence punishable under s 302 read with s 34 of the Penal Code ('PC').

[3] It was contended by the prosecution that Tamil Kumaran a/l Kuppusamy ('SP4') and Muhamad Hafizul Rahman bin Abdul Jalil ('SP5') were eye witnesses, who had seen both the appellants as the perpetrator of the crime at the scene of the vicious attack on the deceased. The prosecution case rested in particular on their evidence. These two witnesses gave an eye witness account of the incident. The learned judicial commissioner ('JC') found no reason to disbelieve them. It was based on their evidence in its essential particulars that the learned JC was satisfied that the prosecution had proved the case against both the appellants beyond reasonable doubt.

[4] The facts as unfolded revealed that on 29 October 2008, SP4 came back from Kuala Lumpur by bus to visit his brother, the deceased, at Rubana Estate in Teluk Intan. His friend, SP5 fetched him from Teluk Intan Bus Station and sent him home. When SP4 came home at about 7.30pm, the deceased was not in but he met his other elder brother by the name of Thanabalan who stayed with the deceased. Later, the deceased came back at 10pm. After that, all the three brothers were chatting for about half an hour. Not long after that, Thanabalan left the house and the deceased retired to bed.

[5] At about 11.30pm, SP5 came to look for SP4. They chatted for ten minutes. SP4 then asked SP5 to buy for him some food from the shop. On his way out to buy food, SP5 was stopped by the second appellant. The second appellant asked SP5 whether the deceased was in the house. SP5 said he did not

know. At that time, the first appellant who was with the second appellant had mistaken SP5 as the deceased and wanted to beat him up. The first appellant did not beat SP5 when the second appellant told him that SP5 was not the elder brother of SP4. SP5 then took the second appellant to the deceased's house on his motorcycle as a pillion rider. They stopped by the roadside in front of the deceased's house. When SP4 came out of the house, SP5 told him that the second appellant was looking for his elder brother. SP4 and the second appellant were then engaged in a conversation in the Tamil language.

[6] When SP4 was talking to the second appellant, a car came at high speed and stopped in front of SP5. When the driver came out of his car, SP4 ran away. When SP4 ran away, the driver went back to his car and chased after SP4 in his car. The second appellant then shouted for someone towards the direction of his house. Then came the first appellant and two other persons. All the four of them were seen entering the house. SP5 who was then still standing by the roadside in front of the house heard the noise of someone being beaten up and the screaming from inside the house. Soon after that, the said car came back to the house. SP5 saw the driver alighting from his car and carrying a piece of wood waiting in front of the car. About ten minutes later, the first and second appellants and two others were seen pulling the deceased out of the house. The deceased was being beaten up by the four persons at the verandah near the staircase. The second appellant was seen using a helmet in the assault. After beating the deceased, they pulled him to the car. SP5 saw one of the two persons took an exhaust pipe and beat the deceased and some of them were using flower pots to beat the deceased. The deceased was trying to run away but he fell into a drain. The driver then went towards the deceased and beat him with the piece of wood he was holding. After the assault, the deceased was pulled into the car. The first appellant was seated beside the deceased. The driver then entered the car and was followed by the second appellant and the other two persons. The car then left the scene.

[7] On the next day at about 9.30am, the deceased's body was found near a riverside at R & R, Jambatan Batu 5, Jalan Maharajalela, Teluk Intan.

[8] The pathologist, Dr Mohammad Shafie Othman @ Osman ('SP1'), who conducted a post mortem examination on the deceased body certified that the cause of death was due to head injuries caused by blunt trauma. He was of the view that the head injuries sustained by the deceased were caused by the blow of a hard and blunt object which were done repeatedly with great force. SP1 estimated the time of death could have taken place within 24 hours from the time the deceased body was admitted at the Forensic Unit, Hospital Teluk Intan on 30 October 2008 at 11.25am.

[9] During the course of the hearing before us, the main thrust of the

arguments of learned counsel for both the appellants was that the learned JC had erred in failing to appreciate that there were numerous material discrepancies between the evidence of SP4 and SP5 and such discrepancies had given rise to doubts as to whether SP4 and SP5 were present on the night in question and whether they could be believed that they had seen the deceased being assaulted. Learned counsel argued that the learned JC misdirected himself in that he overlooked and failed to appreciate that the unexplained material discrepancies had raised a reasonable doubt on the prosecution's case.

[10] On the facts and the prevailing circumstances of this case, we found no merit in this argument. In our judgment, this was a factually based ground of appeal, essentially revolved around the issue as to whether SP4 and SP5 were credible witnesses. The same arguments were raised before the learned JC. The learned JC had given his most anxious considerations of the so called 26 discrepancies between the evidence of SP4 and SP5. In the words of the learned JC:

> From the perusal of the testimonies of SP4 and SP5, I find that their testimonies were consistent as regards who the assailants were and how they came to the crime scene on the night in question.
>
> However I find that most of 26 discrepancies raised by the learned defence counsel are in respect of the number of assailants who entered Mungunthan's house, how they entered the house, who actually assaulted Mungunthan and what types of weapons were used and the rest of the discrepancies are minor discrepancies.
>
> Although there are discrepancies between the evidence of SP4 and SP5 on the number of assailants who entered the house, how they entered the house, who assaulted Mungunthan and the types of weapons used, I cannot agree with the submission of the learned defence counsel that such discrepancies had completely destroyed the credibility of both SP4 and SP5. There is no rule of law that the testimony of a witness must either be believed in its entirety or not at all (see *Public Prosecutor v Date Hj Harun bin Hj Idris* [1997] 1 MLJ 15). It is necessary for the Court to scrutinise the evidence carefully in order to find out why such discrepancies had arisen.

[11] The passage above makes it patently clear that nothing more may fairly be expected of the learned JC on this issue. It is true that in search of truth judges have to be aware of being misled by half-truths and false evidence. Even if there were discrepancies in the evidence of SP4 and SP5, it does not mean that the whole evidence of the prosecution has to be discarded. Minor discrepancies are common features in the testimony of any two witnesses. When a witness is subjected to lengthy cross-examination, there is always a possibility of the witness committing mistakes which can be termed as contradictions. However honest and truthful a witness may be, minor discrepancies can occur due to errors of observation and due to lapse of time. In administering justice, the realities of life and the ordinary course of human

nature have to be kept in mind while appreciating the evidence for arriving at the truth. It is therefore the duty of the learned JC to scrutinise and analyse the evidence with care. The learned JC must judge the evidence of both SP4 and SP5 as a whole. The learned JC had to appreciate and assess the evidence of SP4 and SP5 by the yardstick of probabilities, its intrinsic value and how far it fits in with the rest of the evidence and the circumstances of the case. This is what the learned JC had done in this case. The learned JC had made every effort to discover the core of the truth in the evidence of both SP4 and SP5. In our judgment, the learned JC directed himself correctly upon this aspect of the law and it would be wrong to say that just because a witness may have contradicted himself in his evidence or even told lies on one or two points his whole evidence should be totally rejected (see *Khoon Chye Hin v Public Prosecutor* [1961] 1 MLJ 105b, *Che Omar bin Mohd Akhir v Public Prosecutor* [1999] 2 MLJ 689; [1999] 2 CLJ 780). Since this issue involved the credibility of SP4 and SP5, as a trier of fact, the learned JC was, as a matter of fact, in a better person to judge whether or not they were witnesses of truth and even if their evidence in regard to one part of prosecution case was not accepted, their reliable and trustworthy evidence in other parts of the prosecution case could be acted upon (see *Muniandy & Ors v Public Prosecutor* [1966] 1 MLJ 257). The learned JC for good and cogent reasons found that both SP4 and SP5 to be truthful and reliable witnesses. In this regard, we had ourselves carefully scrutinised the whole of the evidence in the appeal records in the light of the criticisms raised by learned counsel for the appellants. From the evidence, it had been established that both SP4 and SP5 were present at the crime scene on the night in question. Even more to the point, evidence showed that two of the five assailants who came to the deceased's house on the night in question were the first and second appellants and that they and three others who are still at large had assaulted the deceased with helmet, a piece of wood, flower pots and exhaust pipe on the night in question before taking the deceased away in their car. The existence of common intention is a question of fact and in each case it may be proved as a matter of inference from the circumstances of the case (see the cases of *King-Mahbub Shah v Emperor* AIR 1945 PC 118, *Sabarudin bin Non & Ors v Public Prosecutor* [2005] 4 MLJ 37; [2005] 1 AMR 4, *Krishna Rao a/l Gurumurthi v Public Prosecutor and another appeal* [2009] 3 MLJ 643; [2009] 2 CLJ 603, *Wan Yurilhami bin Wan Yaacob & anor v Public Prosecutor* [2010] 1 MLJ 749; [2010] 1 CLJ 17). In the present case, careful perusal of the entire primary facts adduced by the prosecution warrant an inference of the common intention of all, including both the appellants to commit murder by causing the death of the deceased. In our judgment, the learned JC's findings of fact did not contain any error warranting appellate intervention. In this regard, it is an established principle that an appellate court should be slow in disturbing such finding of fact arrived at by the trial judge, who had the advantage of seeing and hearing the witnesses, unless there are substantial and compelling reasons for disagreeing with the finding (see *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393, *Herchun Singh & Ors v Public Prosecutor* [1969]

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2 MLJ 209 and *Dato' Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232; [1983] 2 CLJ 10). We cannot substitute our view to that of the learned JC as trier of fact when the learned JC had given good and cogent reasons for his conclusions.

[12] We turn next to the second ground raised by learned counsel for the appellants. It was argued that the particulars of the car belonging to one of the persons who assaulted the deceased was recorded in a log book in the guard house on the night the incident took place. Learned counsel argued that an adverse inference against the prosecution should be invoked under s 114(g) of the Evidence Act 1950 on account of the failure of the investigating officer to investigate and produce the log book. We do not agree and we dismissed the arguments for the following reasons. In the first place, adverse inference under the provision referred to by learned counsel can only be drawn if there is withholding or suppression of evidence and not merely on account of failure to obtain such evidence (see *Munusamy v Public Prosecutor* [1987] 1 MLJ 492). Moreover, adverse inference may be drawn from withholding not just any document, but material document by a party in his possession. On the facts, the log book was neither relevant nor material for the purpose of establishing a prima facie case against both the appellants. In our judgment, the prosecution has led sufficient evidence to unfold the narrative of the case, and that the failure to produce the log book was not fatal.

[13] Finally, we now turn to consider the appellants' contention that their defence was not adequately considered by the learned JC. We found the complaint of learned counsel lacked merit. Having heard the defence case, the learned JC, in our view, correctly held the evidence adduced by the defence was evidence in support of the defence of alibi. This then brings into direct focus the provision of s 402A of the Criminal Procedure Code ('CPC'), which provides that where in any criminal trial the accused seeks to put forward a defence of alibi, evidence in support thereof shall not be admitted unless the accused shall have given notice in writing thereof to the public prosecutor at least ten days before the commencement of the trial. In *Vasan Singh v Public Prosecutor* [1988] 3 MLJ 412; [1981] CLJ (Rep) 166, the Supreme Court discussed the objective of s 402A of the CPC as follows:

> Section 402A was added to the Criminal Procedure in 1976. Until then, accused persons were free to put up an alibi defence and to call witnesses in support of the alibi thus creating an element of surprise at the trial. The object of s 402A is aimed at this mischief. It seeks to deprive accused persons of the privilege of keeping back a defence of alibi until the last moment. Clearly the object is to prevent the accused person from keeping back not merely the names of any witnesses he might call in support of the alibi, but also the fact that an alibi is to be raised.

[14] Coming back to the present case, no written notice under s 402A of the

CPC had been given by both the appellants to the public prosecutor. The effect of non-compliance of the provision was discussed in the case of *Vasan Singh v Public Prosecutor* as follows:

> It follows that, initially the court cannot prevent an accused person from giving evidence. Having heard the evidence, then the trial court must decide the nature of the evidence. If it is only evidence of bare denial, the evidence stays. If it is evidence in support of an alibi and no notice under 402A has been given, then he must exclude that part of the evidence from his consideration of the defence evidence.

[15] A scrutiny of the judgment of the learned JC, especially at pp 34–45 Vol 1 of the appeal records, revealed that he took exceptional care to follow and apply the approach indicated in the case of *Vasan Singh v Public Prosecutor*. In the words of the learned JC:

> Applying the principles to our case, the evidence of SD1 and SD2 alone giving the particulars of the place where they claimed to have been and the persons whom they were with at the time of the commission of the offence with which they were charged or the evidence of SD1 and SD2 with the evidence of SD3 to corroborate their evidence would both be evidence in support of the defence of alibi and should be rejected outright since no written notice under s 402 of the CPC had been given.

[16] Further down in his judgment, the learned JC made an important observation on this point by saying:

> … I went further to treat and consider the defence put forward by SD1 and SD2 without any supporting evidence as one of bare denial. I find that such bare denial without other proof when being considered vis-a-vis the evidence adduced in totality had failed to create any reasonable doubt in the prosecution case. The prosecution had therefore proved the case against both the accused beyond reasonable doubt.

[17] In our judgment, the learned JC directed himself quite rightly along the approach indicated in *Vasan Singh v Public Prosecutor*. The learned JC had done all that was required of him by the law.

[18] For the reasons that we have stated, we do not see any merit in this appeal. The evidence presented by the prosecution against the appellants was compelling. Having carefully scrutinised all the evidence contained in the appeal records and carefully read the judgment of the learned JC, we were wholly satisfied that the convictions of the appellants were safe. The appeals

were therefore dismissed. We accordingly affirmed the convictions and the death sentences imposed by the learned JC.

Appeal dismissed.

Reported by Afiq Mohamad Noor